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No. 91-568

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CLAXTON R. COOK and MABLE E. COOK,
Petitioners,

versus

ATLANTIC RICHFIELD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE -- CORRECTIONS AND ADDITIONS

During the proceeding before the District Court, Petitioners by court order filed an Amended Complaint, and attached thereto as exhibits oil and gas leases granted by Petitioners to W. R. Thixton, Jr. in 1979, and a letter from Mr. Thixton to Petitioners delivered to them concurrently with his receipt of the oil and gas leases. Petitioners asserted five claims for relief: 1) rescission of the oil and gas leases for fraud in the inducement, alleging the Thixton letter was fraudulent; 2) damages for breach of the oil and gas leases and of the Thixton letter, alleging each to be contracts between Petitioners and the defen-

dant Atlantic Richfield Company[1]; 3) damages to Petitioners' land by reason of ARCO's oil and gas operations; 4) reformation of the oil and gas leases in order to include therein the terms of the Thixton letter; and 5) damages to Petitioners' land caused by pollution.

ARCO moved to dismiss Petitioners' second claim for relief pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, urging *inter alia*, that the Thixton letter was not contractual in nature and that damages could not be sought for its breach. In the alternative, ARCO urged that if the court determined the Thixton letter to be part of the agreement between the parties, then the arbitration provision incorporated therein must be enforced, and that a court order compelling arbitration should issue. Further, ARCO requested that Thixton's authority and agency be assumed.

The Thixton letter to Petitioners recited that it constituted "a preliminary effort to set forth the guidelines which would be present in any agreement to be entered into between us if and when a well is drilled upon your premises."

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[1] The Appellants/Petitioners, Claxton R. Cook and Mable E. Cook, are referred to herein as "Petitioners." The Appellee/Respondent, Atlantic Richfield Company, is referred to herein as "ARCO." ARCO is a publicly held company with its stock being traded on the New York Stock Exchange. Its affiliates and subsidiaries are: ARCO Alaska, Inc.; ARCO Chemical Co.; ARCO Coal Co.; ARCO International Oil and Gas Co.; ARCO Natural Gas Marketing, Inc.; ARCO Oil and Gas Co.; ARCO Pipe Line Co.; ARCO Products Co.; ARCO Transportation Co.; Four Corners Pipe Line Co.; Lyondell Petrochemical Co.; and F & H Pipeline Co.

Since ARCO's Rule 12(B)(6) motion to dismiss was not directed to all claims asserted in Petitioners' Amended Complaint, ARCO concurrently filed its Answer. Therein, ARCO alleged that Thixton was not acting as ARCO's authorized agent when he delivered his letter to Petitioners during the process of obtaining oil and gas leases from them. ARCO's Answer also sought arbitration of Petitioners' claims if their second claim for relief, which was based on their allegation that the Thixton letter was an enforceable contract, was not stricken.

Petitioners erroneously state that the District Court overruled ARCO's original motion to dismiss because ARCO had no standing under Oklahoma law to seek an order of arbitration. Rather, the District Court merely found that the motion should be treated as one for summary judgment and that material fact issues existed. Also, the District Court's Order entered June 22, 1984 attached hereto as Appendix A , recited:

> The Motion to Dismiss having been denied *in toto*, the Court must now consider the Defendant's Application for Arbitration. The Court is of the opinion that the application must be denied. Although the document advanced by the Plaintiffs as part of the alleged contract calls for arbitration of disputes, the Defendant apparently denies that said document is part of the contract. There being a dispute as to whether an arbitration argument [sic] exists in this case, the Court cannot order arbitration at this time. 15 O.S.

> 1981 § 803; 9 U.S.C. § 4 (1982). Further, the Court has not been briefed on whether the law of Oklahoma or federal law controls the argument [sic] in this case. It may well be that an order for arbitration will be appropriate at some later date, but such an order would not be properly made at this stage of the proceeding. Accordingly, the Application for Arbitration is denied.

By motion and brief filed November 14, 1984 ARCO renewed its request that arbitration be ordered. ARCO conceded in its brief that Thixton was ARCO's agent, and, that the Thixton letter constituted a reduction to writing of the understanding reached by the parties. ARCO's brief then recited "[a]ccordingly, the court should interpret its content and rule as a matter of law whether or not it is a contract . . . . If these leases were then burdened by the Thixton letter as a contract between the parties, then defendant is now by assignment a party to that contract. So, this should no longer serve as an obstacle to the court's consideration of the legal question of whether or not the Thixton letter is contractual on its face. If it is, then the defendant is liable for alleged breaches thereof, but determination of any liability must be decided by arbitration."

This should have put Petitioners on notice that the court could well find that a binding arbitration agreement existed. Petitioners' response, however, was merely that the court had already ruled on the matter, urging again

that the Thixton letter did not contain a provision which constituted an agreement to arbitrate.

Petitioners also persisted in urging that one cannot seek arbitration without first asserting that an agreement to arbitrate exists. So, ARCO in its reply brief withdrew any argument that the Thixton letter was not part of the contract between the parties, reciting that "[t]here is no question but that the Thixton letter is part of the arrangement between the parties and gives rise to mutual obligations which may not otherwise exist. The terms of the letter, as expressed by its content, are part of the oil and gas lease transaction."

The court's Order dated January 15, 1985 "resolved the dispute in favor of a valid agreement to arbitrate," concluding that the Thixton letter was part of the contract, "a conclusion well supported by substantive law in addition to the defendant's admission."

By Order entered December 18, 1984, the trial date scheduled for January, 1985 referred to by Petitioners was stricken and not rescheduled. The court further ordered that a final pretrial order be submitted no later than March 1, 1985. Hence, the order directing the parties to arbitration did not occur "on the eve of the trial," as asserted by Petitioners.

In response to the District Court's Arbitration Order, Petitioners filed a Motion for New Trial which was treated by the District Court as a FED.R.CIV.P. Rule 59(e) motion. Petitioners again urged, *inter alia*, that an

agreement to arbitrate did not exist, but raised in no manner any contention that ARCO had waived its right to seek arbitration. Administrative closure obviously had not prevented the filing of this or any other motion by Petitioners after arbitration had been ordered. Parts of Petitioners' claims were thereafter settled and Petitioners presented an attorney fee dispute to the District Court for determination. Petitioners therefore incorrectly state that administrative closure of this action excused or prevented them from presenting any waiver issue to the District Court.

There is no indication that Petitioners objected to anyone, including the arbitrators selected by the parties, never raising what Petitioners now allege to be prejudicial delay in seeking arbitration. Petitioners fully participated in lengthy arbitration proceedings without voicing any objection to anyone, and received an award of $25,000. This sum was deemed inadequate by Petitioners who then moved to vacate the arbitrators' award. Again, no assertion was made that ARCO had waived its right to arbitration. Accordingly, the issue of waiver was never presented to the District Court.

Petitioners first raised the waiver issue during their appeal to the Tenth Circuit Court of Appeals. In response, ARCO urged that not only had this issue not been raised in Petitioners' Motion to Vacate, waiver was likewise not raised in Petitioners' Motion for New Trial or any other post-ruling motion filed prior to the arbitration proceedings, and, that it also could have been preserved

by objection to the arbitrators prior to their hearing and deliberations.

Petitioners' reply brief to the Tenth Circuit Court of Appeals cited Rule 46 for the first time, urging that it applied here to allow Petitioners to first raise the waiver issue on appeal. But, as here, Petitioners then urged that they should be excused from having raised this issue of waiver before the trial court after it ordered arbitration because motions for new trial are not a prerequisite to appellate review of trial court rulings if objections to the asserted error had already been made.

The Tenth Circuit Court of Appeals found this fact-intensive issue inappropriate for consideration on appeal because it could have been, but was not, pursued before the District Court. The appellate court correctly determined that ample opportunity existed to pursue the waiver issue in the trial court, including in Petitioners' motion which resulted in the ruling from which the appeal was taken. Thus, the appellate court did not consider application of Rule 46 as asserted by Petitioners in its decision to affirm the trial court's refusal to vacate the arbitrators' award.

REASONS FOR NOT GRANTING THE WRIT

Certiorari should not be granted for the following reasons:

1) Petitioners do not and cannot clothe for favorable consideration the issue they raise with any basis set forth

in Rule 10.1 of the Supreme Court Rules. Petitioners do not even seek review of any decision on the issue presented.

2) Rule 46 generally relates to rulings made during trial proceedings, requiring that the trial court be in some manner apprised of the objecting parties' position or objections. Such notice must be communicated prior to the ruling if possible. If not afforded an opportunity prior to the ruling, any asserted error may be made known without prejudice thereafter to the trial court in order to preserve such objection and in order to allow the trial court to reconsider and to cure any possible error. Rule 46 has been referred to in relation to pretrial rulings, but seldom with respect to rulings on motions briefed by the parties. When referred to with respect to *sua sponte* rulings of the trial court, timely communication of any objections to such rulings is required in order to preserve any error for appellate review.

3) If Petitioners had been misled or surprised by the trial court's order directing the parties to arbitration, and, had waiver of the right to arbitrate then been perceived by Petitioners as an issue for which opportunity to raise had not been afforded, Petitioners could have, but did not, file or seek leave to file a motion pursuant to FED.R.CIV.P. Rule 60(b) -- another available procedure for preserving the issue for appellate review.

4) Petitioners had no basis for urging that ARCO had waived its right to arbitrate at the time that ARCO first requested arbitration in its Motion to Dismiss and

Answer. In denying ARCO's Motion to Dismiss on June 22, 1984, the trial court stated that "[i]t may well be that an order for arbitration will be appropriate at some later date, but such an order would not be properly made at this stage of the proceeding." Appendix A. As the trial court foresaw, ARCO's request for arbitration was granted when it was renewed on November 14, 1984. If Petitioners thought that ARCO had waited too long to renew its request for arbitration, Petitioners could and should have brought this to the attention of the court prior to the court's ruling on January 15, 1985. Likewise, Petitioners could and should have objected to ARCO's delay in renewing its request for arbitration when the trial court was asked by them to reconsider its order of arbitration. As reflected by the court's Order dated March 20, 1985 attached hereto as Appendix B, Petitioners only urged again that the contract did not require arbitration. Thereafter, Petitioners proceeded to fully participate in the arbitration process without ever raising any issue of ARCO's waiver of the right to arbitrate. It clearly cannot be said that Petitioners had "no opportunity" to raise the issue of waiver before the arbitrators deliberated and issued their award.

5) As evidenced by the trial court's order denying Petitioners' Motion to Vacate the Arbitration Award, attached hereto as Appendix C, which is the order from which the appeal was taken, Petitioners reasserted, *inter alia*, their position that the contract between the parties did not contain an arbitration agreement. The trial court reaffirmed its earlier ruling on this point, with Petitioners having advanced no new arguments. Petitioners did not,

although they surely could have, raise any issue of waiver in seeking to have the trial court vacate the arbitrators' award. Had they done so, there is every indication that the court would have considered the matter. As it is, the issue was never presented for consideration, and the Petitioners never undertook to enter evidence or argument into the record directed to this issue. The record as it exists fails to support any conclusion that ARCO had waived the right to arbitrate. Had the matter been presented to the District Court, it may well have found that ARCO had not waived arbitration, a ruling not likely to be reversed on appeal.

6) The requisite elements for a finding of waiver were not present in any event. ARCO sought arbitration at the outset of the proceedings before the trial court. Not only had Petitioners resisted ARCO's pursuit of arbitration on the doubtful theory that ARCO must first admit or assert that an agreement to arbitrate existed, Petitioners continuously contended that the contract between the parties did not contain a provision intended to require submission of disputes to arbitration. While ARCO repeatedly requested that the court resolve this issue and order arbitration, Petitioners urged that arbitration was in any event improper. The parties of necessity had to await a court determination as to that issue before arbitration could be enforced, due to the position both parties were taking with respect to the existence of a binding agreement to arbitrate. Moreover, the court's ordering of arbitration resulted from the court's own resolution of the dispute as to the existence of the con-

tract, not because of any surprising or inconsistent change of position taken by ARCO.

The record fails to disclose any delay caused by ARCO's allegedly improper or inconsistent action. There has been no showing that Petitioners were prejudiced by the parties' necessary participation in the litigation process pending a ruling by the court on the promptly raised request that the court: 1) determine as a matter of law whether a binding agreement to arbitrate existed and; 2) enforce the arbitration agreement if the court found one to exist.

7) Petitioners attempt to formulate a situation giving rise to that which they admit is difficult to conceive in seeking a construction of Rule 46 heretofore never decided. Accordingly, Petitioners cite no supporting authority. Of the few authorities referred to, three of them purport to be from Wright and Miller, Federal Practice and Procedure. However, two of these three citations are incorrect and do not exist. Further, Petitioners erroneously argue that if one does not make known an objection prior to a ruling because there was no opportunity to do so prior to the ruling, then no objection need thereafter be made to the trial court in order to claim error on appeal. On the contrary, to the extent Rule 46 may apply to appellate review of pre-trial rulings on briefed motions, it does not allow a party to appeal based on a claimed error with respect to a matter not addressed by the parties and never brought to the attention of the trial court, either before or after the ruling. The language of Rule 46 means that if no opportunity

existed to present one's position with respect to any particular ruling, the trial court should reconsider if called upon to do so and cannot refuse to do so because the claimed error was not presented prior to the ruling. Since the "surprised" party is not prejudiced from making the objection after the ruling, it is for this very reason that, unless the objection is made to the trial court after the ruling (especially if the error is then curable and procedures to present the matter are available), appellate review is not available when the trial court has not been given the opportunity to rule on the objection.

8) Petitioners state that the aspect of Rule 46 on which Petitioners rely and characterize as unique has never been addressed. However, in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 102 L.Ed.2d 445, 109 S.Ct. 439 (1988), during proceedings concerning the exclusion of evidence, plaintiff's counsel was cut off by the trial court during his argument and was actively deprived of presenting the reason for his objection for the exclusion of evidence. The trial court excluded the evidence and the Eleventh Circuit Court of Appeals reversed. This Court affirmed, based in part upon Rule 46. Rather than finding that no objection was necessary at the trial level because plaintiff's counsel had been denied the opportunity to object by the court, this Court found that the plaintiff's point had been sufficiently communicated to the extent of an awareness on the part of the trial court. Rule 46 has also been addressed so as to recognize that its purpose is to require that the trial judge be promptly informed of potential errors so that an opportunity to reconsider and to make any changes is afforded. *Morrow*

v. Greyhound Lines, Inc., 541 F.2d 713, 724 (8th Cir. 1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 558 (1st Cir. 1974). Here, the Tenth Circuit Court of Appeals followed settled law when it held that issues not raised in the trial court cannot be considered as a basis for reversal on appeal. Also, it is settled that counsel cannot remain silent and interpose no objection awaiting the outcome and then claim the occurrence of error. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239, 84 L.Ed. 1129, 1176, 60 S. Ct. 811, 851 (1940); *Cooper v. Dyke*, 814 F.2d 941, 949 (4th Cir. 1987). In addition, it has been held that motions to reconsider, promptly filed, may serve as a vehicle to preserve error under Rule 46. *United States v. Conservation Chemical Co.*, 106 F.R.D. 210, 228 (W.D. Mo. 1985).

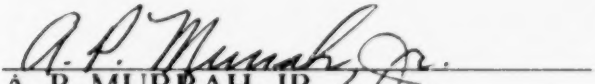
9) While arbitration is favored, use of special masters by trial courts is not. Yet, the *sua sponte* appointment of a special master by a trial court is analogous to the position as asserted here by Petitioners, to the extent both occurred without an opportunity to object. In *Macri v. United States*, 353 F.2d 804 (9th Cir. 1965), the trial court referred certain issues to a special master, and no objection was made. On appeal it was urged under Rule 46 that a lack of opportunity to object existed. The Ninth Circuit held that an objection could have been made during the interim between the court's ruling and the actual appointment of the special master, and, proceeded to apply the rule that matters raised for the first time on appeal would not be considered. To the same effect, in the *sua sponte* appointment of a special master without objection thereafter being timely presented to the trial

court, *see Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir. 1984); *McGraw-Edison Co. v. Central Transformer Corp.*, 308 F.2d 70 (8th Cir. 1962); *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Electric Co.*, 245 F.2d 613, 628 (8th Cir. 1957).

CONCLUSION

Sufficient grounds for granting a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit are not present and Petitioners' request should be denied.

Respectfully submitted,



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APPENDIX A

FILED
June 22, 1984
United States District Court
_____, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

CLAXTON R. COOK and MABLE E. COOK, *Plaintiffs,* vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, *Defendant.*	CIV-83-1717-R

ORDER

On March 6, 1984, the Court granted the Defendant's Motion for More Definite Statement. Shortly thereafter the Plaintiffs filed their First Amended Complaint. The Defendant has again challenged the Plaintiffs' pleading by motion; in this instance the Defendant urges for dismissal or, in the alternative, for an order to arbitrate. The

Plaintiffs have responded in objection to both requests and the Court is now prepared to dispose of the Defendant's motion.

The Motion to Dismiss is made pursuant to FED.R.CIV.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Two separate arguments are advanced by the Defendant in support of this motion. The Defendant first asserts that the second claim for relief in the Complaint is insufficient to state a claim in that it is conclusory. Specifically, the Defendant contends that the Plaintiffs allege a breach of contract without designating the particular provision of the contract alleged to have been breached.

It is true that the First Amended Complaint is little better than the original Complaint in terms of specificity. Further, the allegations of breach in the second claim for relief are conclusory, and standing alone those allegations would be subject to dismissal under FED.R.CIV.P. 12(b)(6). However, the third claim for relief, apparently one for tortious injury to property, recites that the Defendants contracted to remedy such damages to property. Thus, it seems obvious that the Plaintiffs intend to assert breach of this provision in support of their contract theory. Inartfully drafted though the Complaint may be, the Court nevertheless concludes that it is sufficient to withstand a Motion to Dismiss for failure to state a claim under the liberal pleading rules of the Federal Rules of Civil Procedure. FED.R.CIV.P. 8(a)(2); *Harbert v. Rapp*, 415 F.Supp. 83, 86 (W.D. Okla. 1976).

The second argument in support of the Motion to Dismiss advanced by the Defendant is that the Plaintiffs, in their second claim for relief, rely on a document which is insufficient as a matter of law to obtain treatment as a contract. Because the Court is required to consider materials other than the First Amended Complaint, the motion must now be treated as one for summary judgment. FED.R.CIV.P. 12(b); FED.R.CIV.P. 56. Further, the Court concludes that it must be denied, as there are genuine issues of material fact concerning the documents alleged to be part of the contract. Such factual issues make summary judgment inappropriate. FED.R.CIV.P. 56; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Ando v. Great Western Sugar Co.*, 475 F.2d 531 (10th Cir. 1971).

The Motion to Dismiss having been denied *in toto*, the Court must now consider the Defendant's Application for Arbitration. The Court is of the opinion that the application must be denied. Although the document advanced by the Plaintiffs as part of the alleged contract calls for arbitration of disputes, the Defendant apparently denies that said document is part of the contract. There being a dispute as to whether an arbitration argument [sic] exists in this case, the Court cannot order arbitration at this time. 15 O.S. 1981 § 803; 9 U.S.C. § 4 (1982). Further, the Court has not been briefed on whether the law of Oklahoma or federal law controls the argument [sic] in this case. It may well be that an order for arbitration will be appropriate at some later date, but such an order would not be properly made at this stage of the proceeding. Accordingly, the Application for Arbitration is denied.

In summary, the Defendant's Motion to Dismiss the Second Claim for Relief in Plaintiffs' First Amended Complaint, or, In the Alternative, to Order Arbitration by the Parties in denied *in toto*.

IT IS SO ORDERED this 20 day of June, 1984.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED
March 20, 1985
United States District Court
Nancy Estep, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLAXTON R. COOK and MABLE E. COOK, *Plaintiffs,* vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, *Defendant.*	CIV-83-1717-R

ORDER

On January 15, 1985 the Court issued its Order staying proceedings in this action and requiring the parties to submit to arbitration, as provided for by the contract which is the subject matter of the action. The Plaintiffs have filed a Motion for New Trial Or In the Alternative for Clarification, to which the Defendant has responded in

opposition. Although a Motion for New Trial is improper in this action because no trial has been conducted, *see Jones v. Nelson*, 484 F.2d 1165, 1167 (10th Cir. 1973), the Plaintiffs could have properly challenged the legal bases of the Court's January 15 ruling with a Motion to Alter or Amend. FED.R.CIV.P. 59(e). *See also St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). Thus, the Court will consider the Plaintiffs' motion as if made pursuant to FED.R.CIV.P. 59(e) rather than FED.R.CIV.P. 59(a).

The Plaintiffs ask the Court to reconsider its determination that the contract between the parties requires arbitration of the issues in this action. They contend that the paragraph in question simply requires an appraisal of damages, rather than binding arbitration. The Court does not agree. Notwithstanding the use of the term "appraisers", it is clear that Paragraph 11 contemplates binding arbitration between the parties on issues of liability and damages. As the Defendant asserts, it is the substance of the provision, rather than the labels used therein, which is controlling and the contract clearly provides that the appraisers' decision shall be binding. The Court is satisfied that these parties have agreed to arbitrate, and the Plaintiffs' Motion for New Trial, treated as a Motion to Alter or Amend, is denied.

The Plaintiffs also seek clarification of the Court's Order of January 15. As that Order rather clearly requires the Plaintiffs to submit all claims raised in this action to arbitration, *see Cook v. Atlantic Richfield Co.*, No. CIV 83-1717-R, slip op. at 5 (W.D. Okla. January 15,

1985) ("The parties are hereby ordered to submit the claims in this action to arbitration . . ."), the request for clarification is a cleverly disguised attempt to have the Court reconsider its finding that the claims should be arbitrated. Nevertheless, the Court is not averse to specifying the claims to be submitted to arbitration, and to that extent the Plaintiffs' motion is granted: All claims arising in this action are to be submitted to legally binding arbitration.

In summary, the Plaintiffs' Motion for New Trial Or In the Alternative for Clarification is granted in part and denied in part.

IT IS SO ORDERED this 20th day of March, 1985.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
January 30, 1990
United States District Court
Nancy Estep, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLAXTON R. COOK and MABLE E. COOK, *Plaintiffs,* vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, *Defendant.*	CIV-83-1717-R

ORDER

Before the Court is Plaintiffs' motion to vacate the arbitration award entered on July 28, 1989. As grounds for their motion, Plaintiffs assert that 1) the dispute between Plaintiffs and Defendant was not arbitrable because the contract between the parties did not contain an arbitration agreement; 2) the arbitrators erred in ruling that punitive damages were not recoverable by Plaintiffs

because Defendant's offer of partial judgment did not encompass a punitive damage claim and Plaintiffs stated a claim for tortious breach of contract with respect to damages to or destruction of their cattle business; and 3) the arbitrators erred in ruling that Plaintiffs' rescission claim was settled by the partial judgment entered upon Plaintiffs' acceptance of Defendant's offer of judgment.

Plaintiffs' motion is denied. The Court previously determined that the Thixton letter is a part of the parties' contract and that the contract contained an arbitration agreement within the meaning of and enforceable under Oklahoma's Arbitration Act of 1978, Okla. Stat. tit. 15, § 801 *et seq.* *See* Order of January 15, 1985 at pp. 2-4 and Order of March 20, 1985 at pp. 1-2. Plaintiffs have advanced no new arguments to support reconsideration of this determination and the Court declines such reconsideration. Moreover, because this issue was previously adversely determined in accordance with Section 803(A), this issue is not properly raised as a basis for vacating the arbitrators' award. *See* Okla. Stat. tit. 15, § 812A(5).

The other grounds urged by Plaintiffs do not come within the purview of the statutory grounds for vacation of an arbitration award. *See* Okla. Stat. tit. 15, § 812A. However, assuming that the grounds constitute the arbitrators' alleged refusal to hear evidence material to the controversy, *see* Okla. Stat. tit. 15, § 812A(4), the motion to vacate must be denied because the parties expressly agreed to submit to the arbitrators the question of whether or not the partial judgment entered upon Plaintiffs' acceptance of Defendant's offer of judgment

included Plaintiffs' claim for punitive damages for physical injury to their property, *see* Stipulation and Partial Release and Satisfaction of Amended Partial Judgment filed December 3, 1987, and none of the arbitrators' legal determinations were contrary to law or outside of their authority.

Defendant's offer of judgment on "the claims and relief set forth in paragraphs 12a., 12b., 12c., and 12f. of Plaintiffs' Contentions . . . plus all other claims or relief which plaintiffs might or could seek that are covered by . . . [Okla. Stat. tit. 12, § 940]" and Plaintiffs' acceptance thereof must be deemed to have been made with reference to applicable law, *see Buckles v. Wil-Mc Oil Corp.*, 585 P.2d 1360, 1362 (Okla. 1978); *East Central Oklahoma Electric Cooperative, Inc. v. Public Service Co.*, 469 P.2d 662, 664 (Okla. 1970); *McKinley v. Prudential Property and Casualty Insurance Co.*, 619 P.2d 1269, 1270 (Okla. App. 1980), *cert. denied* (Okla. Sept. 22, 1980), which provides that a "claim" for punitive damages is not a separate or independent claim or cause of action. *See, e.g., Smith v. Warehouse Market, Inc.*, 586 P.2d 724, 725 (Okla. 1978); *Norman's Heritage Real Estate Co. v. Aetna Casualty and Surety Co.*, 727 F.2d 911, 915 (10th Cir. 1984). In any event, the phrase "all other claims or relief which plaintiffs might or could seek" (emphasis added) unambiguously and necessarily includes punitive damages because "all . . . relief which plaintiffs might or could seek" encompasses all relief actually sought or which might be sought, whether authorized by law, or not. The rule of contract construction which Plaintiffs contend mandates a different result -- that contracts be construed most strongly against

the drafter -- does not even come into play unless the contract is ambiguous and then only if application of the rules of construction having higher priority, i.e., those set forth in Sections 152 through 169 of Title 15 of the Oklahoma Statutes, does not resolve the ambiguity. *See* Okla. Stat. tit. 15, § 170. Accordingly, the arbitrators did not err in excluding evidence relative to Plaintiffs' claim for punitive damages in connection with their surface damage claim.

The arbitrators also concluded that "punitive damages for the destruction of plaintiffs' cattle business are not recoverable." *see* Partial Arbitration Award of August 17, 1988 (Exhibit "E" to Brief in Support of Motion to Vacate Arbitrators' Award). Plaintiffs contend that this legal determination, which was the apparent basis for the arbitration panel's exclusion of evidence on this issue pursuant to Defendant's motion in limine, was erroneous because Plaintiffs stated a claim for a separate and independent tort of fraud "in the formation and execution of [the] . . . contract," Brief in Support of Motion to Vacate Arbitrators' Award at p. 6. Plaintiffs contend that this claim was based upon Defendant having induced Plaintiffs to sign the oil and gas lease by making promises which Defendant had no intention of keeping. *See id.*

First, in proceedings before the arbitrators, Plaintiffs apparently contended that the independent tort was negligence in leaving pasture gates open, not fraud. *See* Defendants' Brief in Opposition to Plaintiffs' Motion to Vacate Arbitrators' Award at p. 8. Defendant's duty to maintain the cattle gates and to keep them in place arose,

if at all, solely from the parties' contract, the Plaintiffs having cited and the Court having found no duty on the part of Defendant relative to cattle gates imposed by law independent of the contract. Accordingly, the arbitrators did not err in concluding that a claim for punitive damages for destruction of Plaintiffs' cattle business did not lie. *See Burton v. Juzwik*, 524 P.2d 16, 18-20 (Okla. 1974). *See also Zenith Drilling Corp. v. Internorth, Inc.*, 869 F.2d 560, 565 (10th Cir. 1989); *Norman's Heritage Real Estate Co. v. Aetna Casualty & Surety Co.*, 727 F.2d 911, 914-16 (10th Cir. 1984).

Secondly, the Court is of the opinion that a party may not rely on another party's nonperformance of covenants or promises which are a part of the parties' contract as a basis for asserting a separate independent tort of fraud or deceit in the performance or non-performance of the contract. Moreover, in this case Plaintiffs claimed in the alternative that the "false representations" made by Thixton in a letter dated May 30, 1979 either induced Plaintiffs to enter into an oil and gas lease with Defendant through its agent Thixton or were a part of the contract between Plaintiffs and Defendant. On the basis of these allegations, Plaintiffs sought rescission or damages for fraud in the inducement, *see* First Claim for Relief, Amended Complaint, or reformation of the lease to include the representations, *see* Fourth Claim for Relief, Amended Complaint. When this Court determined that the Thixton letter was a part of the parties' contract, *see* Order of January 15, 1985, and Plaintiffs thereafter obtained partial judgment on their breach of contract claim and satisfaction thereof, *see* Stipulation and Partial

Release and Satisfaction of Amended Partial Judgment, Plaintiffs' claim for fraud in the inducement, *see* Plaintiffs' First Claim for Relief, Amended Complaint, and Plaintiffs' Contentions at ¶ 11, was mooted. *See Sisler v. Jackson*, 460 P.2d 903, 909-910 (Okla. 1969); *Atlas Paving Co. v. Tate*, 559 P.2d 1269 (Okla. App. 1977). *See also Uptegraft v. Dome Petroleum Corp.*, 746 P.2d 1350, 1355 (Okla. 1988). Thus, the arbitrators' conclusion that Plaintiffs' first claim for relief was settled by the Partial Amended Judgment because "all issues between the parties have been resolved into and merged into the judgment taken by plaintiffs pursuant to Title 12 O.S. Section 940 or the Order of the Court [of January 15, 1985] except for the issue of compensatory damages arising out of the destruction of the cattle business of plaintiffs," Partial Arbitration Award at p. 2, was not in error or contrary to law. For the same reason, the arbitrators' conclusion that Plaintiffs' rescission claim had been resolved by the Order of January 15, 1985 and/or merged into the Amended Partial Judgment was not error.

Plaintiffs' motion to vacate the arbitrators' award is denied. Defendant's request for confirmation of the arbitration award contained in its brief in opposition to Plaintiffs' motion is granted. The Arbitration Award dated July 28, 1989 and August 17, 1988 is hereby confirmed.

IT IS SO ORDERED this 30th day of January, 1990.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE